United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association Local Union No. 66 *and* Sierra Employees Association, Inc. Case 31-CB-3212

26 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 30 November 1979 Administrative Law Judge William J. Pannier III issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in opposition to Respondent's exceptions, requesting that the Board strike Respondent's exceptions.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge only to the extent that they are consistent herewith. In this proceeding, the Administrative Law Judge found that Respondent violated Section 8(b)(1)(A) of the Act by filing a state court action against the Charging Party because the Charging Party had filed various unfair labor practice charges with the Board against Respondent. For the following reasons, we disagree with the Administrative Law Judge's conclusion that Respondent thereby violated Section 8(b)(1)(A) and we dismiss the complaint in its entirety.

As set forth more fully in the Administrative Law Judge's Decision, the record establishes that the Charging Party (Sierra) represented a group of employers in contract negotiations with Respondent in 1978. During those negotiations, Sierra at various times filed a number of unfair labor practice charges against Respondent which alleged violations of Section 8(b)(1)(A) or 8(b)(1)(B) or 8(b)(3) or 8(b)(4)(i) and (ii)(A) of the Act.[3] Sierra eventually withdrew all of the charges.[4]

Subsequently, in November 1978, when Respondent and all the employers whom Sierra represented had reached agreement on a contract, Respondent thereupon filed a "Complaint for Damages; Abuses of Process and Alter Ego" in a California state court against Sierra. The state court complaint alleged that Sierra had

> misused the process of the Federal National Labor Relations Board by filing numerous written charges against [Respondent] which [Respondent] is informed and believes . . . were false and known to be false at the time made, or, which said charges were not known by Defendants, and each of them, to be false or true . . . .

The state court complaint alleged that Sierra had filed these charges with the Board to gain an unfair advantage in the just-completed negotiations. Respondent sought various damages for Sierra's actions. Sierra, in response, filed a charge with the Board's Regional Office alleging that Respondent's filing of this state lawsuit violated Section 8(b)(1)(A) of the Act. The Regional Office eventually issued the instant complaint alleging that Respondent had violated Section 8(b)(1)(A) of the Act by filing its state court action.

In finding the violation as alleged in this proceeding, the Administrative Law Judge found first that Respondent had filed the civil lawsuit for the purpose of retaliating against Sierra for invoking the Board's processes. He then found this action by Respondent constituted a violation of Section 8(b)(1)(A) of the Act. While the Administrative Law Judge noted that Section 8(b)(1)(A) of the Act specifically provides protection from union restraint and coercion to *employees* only, he nonetheless found that in this proceeding Section 8(b)(1)(A) was violated when Respondent filed its state action against the Charging Party, an employer representative. As noted, we disagree with the Administrative Law Judge that Respondent's state

[1] The General Counsel has moved that the Board strike Respondent's exceptions because, *inter alia*, they allegedly fail to set forth with specificity those portions of the Administrative Law Judge's Decision excepted to, and fail to support the contentions made with legal or record citation, or appropriate argument. Sec. 102.46(b) of the National Labor Relations Board Rules and Regulations, Series 8, as amended, states that any exception which does not comply with the requirements of that section "may be disregarded." Although Respondent's exceptions do not comply fully with the requirements of the rule, we have decided not to disregard them as they sufficiently designate the portions of the Decision Respondent claimed were erroneous with supporting argument supplied. *Rice Growers Association of California*, 224 NLRB 663 (1976); cf. *Cabona Mining Corp.*, 198 NLRB 293 (1972).

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] Sierra filed a total of 14 unfair labor practice charges against Respondent on behalf of various of the employers it represented in the negotiations. Different charges filed on behalf of different employers alleged different violations of the Act.

[4] According to its president, Sierra withdrew all the charges at various points in time because: (1) their withdrawal was conducive to a better bargaining atmosphere; or (2) the particular employer wanted them withdrawn; or (3) the law was unclear in a certain area of Board law and Sierra preferred to withdraw the charge at that time and possibly file a new charge later if there was then a basis for it.

court action against the Charging Party violated Section 8(b)(1)(A) of the Act.

Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization "to restrain or coerce . . . *employees* in the exercise of the rights guaranteed in section 7 . . . [emphasis supplied]." Section 8(b)(1)(A), like Section 8(a)(1) of the Act,[5] is a broad provision implementing the Act's Section 7 rights, which are reserved to *employees*. Section 8(b)(1)(A) protects the exercise of these rights against restraint by labor organizations, as Section 8(a)(1) does against restraint by employers. However, as noted, the rights thus protected are those of employees only. In further implementation of these employee rights guaranteed by Section 7, Congress enacted various other sections of the Act, which describe particular kinds of employer or union actions that frustrate the purposes embodied in Section 7 of the Act. One of these sections, Section 8(a)(4), gives special recognition to the right of employees to file charges or give testimony under the Act, and protects that right from employer retaliation.[6] Likewise, Section 8(b)(1)(A) of the Act has been interpreted as protecting employees from unions' interference with this right to file charges or give testimony under the Act. *NLRB v. Shipbuilders*, 391 U.S. 418 (1968). The importance of this right to file charges or give testimony under the Act, however, does not permit the Board to transfer this right to a class of legal persons for whom there is no evidence that Congress intended it. By his recommended Decision in this case, however, the Administrative Law Judge attempts to achieve precisely that object.

Implicitly, all persons have a "right" to file charges; the Board will accept a charge filed by anyone. At issue here, however, is whether this right is statutorily protected from certain kinds of responses from others. The desirability of having "all persons with information about [unfair labor] practices be completely free from coercion against reporting them to the Board,"[7] which caused Congress in 1935 to enact the predecessor to Section 8(a)(4), provides an insufficient basis on which to expand so radically on the words Congress used in 1947 to form Section 8(b)(1)(A). Had Congress chosen to establish such specific protection in Section 8(b)(1)(A) for employers and their representatives in addition to the protection provided for employees, it seems extremely unlikely that it would have attempted to do so, or would have thought it did so, through a provision prohibiting only the restraint or coercion of "*employees* in the exercise of the rights guaranteed in section 7 [emphasis supplied]." Thereafter, we can only speculate on whether, had Congress considered whether to act in this area, it would have done so or would have decided that the other provisions it enacted regulating union conduct were sufficient to allay any substantial concern about the freedom of employers and others to file charges. Indeed Congress has, in provisions such as Sections 8(b)(1)(B), 8(b)(4), 8(b)(6), and 8(b)(7), specifically protected employers or other persons against certain kinds of union coercion. If there were those who were interested in a separate, independent protection of such persons in filing charges, it seems clear "from the words of the statute itself . . . that [they] were unable to secure its embodiment in enacted law." *NLRB v. Teamsters Local 639 IBEW*, 362 U.S. 274, 290 (1960).

The Board acted within the spirit of the above admonition when it held, in *Malbaff Landscape Construction*,[8] that alleged union secondary activity was not properly litigable under Sections 8(a)(3), 8(b)(2), and 8(b)(1)(A) of the Act. There, the theory of the complaint was that the union caused an employer to discriminate against employees by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees. The Board found that, although there may have been employer discrimination against another employer, Section 8(a)(3) was not designed to protect employers as well as employees and, therefore, union pressure to achieve such an end would not violate Section 8(b)(2) or 8(b)(1)(A). As the Board observed, Section 8(b)(4), not Sections 8(a)(3) and 8(b)(2), was the provision that was designed to deal with secondary activity. In *Malbaff*, it was at least arguable that a proximate result of the union's action was discrimination against employees of a secondary employer.[9] Here, the Administrative Law Judge suggests a possible parallel interest between the employers' representative and employees in the charges filed by the former. He suggests a deterrent effect on employees' right to file charges if the Union is permitted to retaliate against the employer's representative.[10] But there

[5] Sec. 8(a)(1) states that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ."

[6] Specifically, Sec. 8(a)(4) proscribes discharge or other discrimination "against an employee because he has filed charges or given testimony under [the] Act . . . ."

[7] *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967).

[8] *Plumbers Local 447 (Malbaff Landscape Construction)*, 172 NLRB 128 (1968).

[9] See dissenting opinion of Chairman McCulloch, 172 NLRB at 130.

[10] Compare *United Stanford Employees Local 680 (Leland Stanford Junior University)*, 232 NLRB 326 (1977), and similar cases where a union filed a lawsuit against *employees* and was found to have violated Sec. 8(b)(1)(A). In those cases, however, there was a clear and direct relationship between the union action and the foreseeable consequence of that

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is no greater merit in this hypothesis than there is in the argument that Section 8(a)(1) is violated whenever an employer retaliates against an individual, who is not an employee, for engaging in activities for which employees are protected.

The Administrative Law Judge does suggest a connection between the charges filed here and certain contract negotiations affecting the employees. But if the Union's conduct is related to its duty to bargain, the matter is litigable under Section 8(b)(3).[11] There is no more justification, however, for using Section 8(b)(1)(A) here as a backstop for Section 8(b)(3) than there was for using it as a backstop for Section 8(b)(4) as was attempted in *Malbaff*. The Administrative Law Judge also argues for the use of Section 8(b)(1)(A) to protect such employers, none of whom is involved here, as represent themselves for the purposes of collective bargaining and whose interests therefore may not be protected adequately by Section 8(b)(1)(B).[12] But we conclude that it is beyond the Board's authority to broaden specific provisions of the Act beyond the legitimately ascertainable intention of Congress. To do so deflects the statutory provisions from the purposes for which they were intended, and introduces new standards and aims which distort, and may ultimately impair, their original application.

In sum, we think that protection of employers or their representatives under a provision, i.e., Section 8(b)(1)(A), which is plainly directed to protecting employees, equates unlikes, as to which considerations are necessarily different. We think the likely outcome of such an equation is an unwarranted expansion of the original scope of the protection Congress provided. If Congress so wishes to expand that provision's scope, then it is for Congress, and not this Board, to indicate that intention. In the absence of such a Congressional direction, we shall not attempt to expand that scope so radically as does the Administrative Law Judge's Decision. For all the foregoing reasons, we shall dismiss the instant complaint.[13]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

action—the restraint or coercion of employee rights. Thus, as noted in *Leland Stanford*, the filing of the lawsuit in issue there "reasonably tended to coerce and restrain the employees" since it imposed a costly burden on them and might well persuade them to forgo their statutory rights rather than hazard a lawsuit whose outcome was unpredictable and which would require large expenses, including hiring counsel. In the instant case, on the other hand, any such "nexus" between the Union's action and the likely impact on employee protected rights is simply too attenuated to remove it from the realm of pure speculation.

[11] Sec. 8(b)(3) states in pertinent part that "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer . . . ."

[12] Sec. 8(b)(1)(B) states that "I shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining . . . ."

[13] In doing so, we would not dismiss the possibility that, on compelling facts not shown here, protection of an employer or employer's representative's right to file charges under a specific provision of the Act might be necessary to effectuate the provision sought to be enforced. See *Bill Johnson's Restaurants v. NLRB*, 103 S.Ct. 2161, 113 LRRM 2647 (1983). This principle, however, is a far cry from reading into Sec. 8(b)(1)(A) a broad employer protection as a counterpart to Sec. 8(a)(4). In passing, we note again that the instant case was tried solely on the theory of an 8(b)(1)(A) violation. Thus, whatever the possible merit of trying the case under Sec. 8(b)(1)(B), that issue was never litigated. And we do not adopt the Administrative Law Judge's conclusion that to find a violation under Sec. 8(b)(1)(B) here would not protect an employer from such suits when it acts for itself in filing charges.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge: This matter was heard by me in Bakersfield, California, on June 28, 1979. On March 27, 1979, the Acting Regional Director for Region 31 of the National Labor Relations Board issued a complaint and notice of hearing, based on an unfair labor practice charge filed on March 13, 1979, alleging violations of Section 8(b)(1)(A) of the National Labor Relations Act, as amended, 19 U.S.C. § 151, *et seq.*, herein called the Act. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs filed on behalf of the parties, and on my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

This case presents a single basic issue which if answered affirmatively, then poses three subsidiary issues. The principal issue is whether United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association Local Union No. 66, herein called Respondent,[1] instituted a state civil action for abuse of process against Sierra Employer's Association, Inc., herein called Sierra, and its officers as a vehicle for retaliating against Sierra for having filed unfair labor practice charges with the Board against Respondent. If the answer to that issue is affirmative, then the following issues are posed: whether a representative of an employer is entitled to protection under the Act for filing unfair labor practice charges, whether it had been shown that the Board has jurisdiction in this matter under Section 2(6) and (7) of the Act.

[1] It is admitted that at all times material Respondent has been a labor organization within the meaning of Sec. 2(5) of the Act.

Sierra was incorporated in midsummer of 1978.[2] Stephen Martin, its president, functions as a labor relations consultant for its clientele, as did his brother, Douglas, until March 1979. During 1978, Sierra represented between 100 and 150 employers, some individually and some as part of associations that retained Sierra to act as their bargaining representative. Apparently, it is common for Sierra to have each employer or association which it represents sign an agreement providing that Sierra "will counsel and represent the Employer in all the Employer's dealings with labor unions and with local, State, and Federal agencies and departments in matters pertaining to the wages, hours, and working conditions of the employees of the Employer." The only limitation prescribed in the agreement on Sierra's authority is that neither it nor its representatives "shall be empowered to enter into any contract purporting to impose any contractual or other obligation upon the Employer without the prior written authorization or consent of the Employer."

During the summer, the San Joaquin Roofers Association, herein called the Association, retained Sierra to represent it in negotiations with Respondent. At the time, the Association consisted of three employers: Acme Roofing Company, Garcia Roofing, Inc., and Howard & Verrell Roofing Company. During these negotiations, which commenced in August, Sierra also represented Stokes Roofing in negotiations with Respondent. Later, Sierra commenced negotiating with Respondent on behalf of Cagle Roofing.[3]

As negotiations progressed, Sierra filed several unfair labor practice charges against Respondent with Region 31 of the Board. Thus, on August 31, eight such charges were filed. Four of them, denominated Cases 31-CB-3047 through 31-CB-3050, alleged that Respondent violated Section 8(b)(3) of the Act by a series of acts which were enumerated in the charges. Each of the four charges listed a different employer (Acme, Garcia, Howard & Verrell, and Stokes) as being the employer affected by the conduct alleged to be unlawful. This same procedure was followed by Sierra with respect to the other four charges, Cases 31-CC-1068 through 31-CC-1071, each of which alleged that Respondent violated Section 8(b)(4)(i) and (ii)(A) of the Act by threatening, coercing, and intimidating "the employer and coerc[ing] employees in an attempt to force the employer to agree to language prohibited by Sec. 8(e) of the Act as amended." Stephen Martin testified that he had filed separate charges on behalf of each employer to facilitate the Regional Office's investigation and because "the Union was at this time, taking the position that we were maybe and maybe not, involved in an actual multi-employer negotiation." This latter assertion was not disputed by Respondent. On September 7, the Regional Director for Region 31 approved Sierra's request that all eight charges be withdrawn. This request had been made, testified Stephen Martin, because Sierra had "felt at the time that by withdrawing the charges, would be conducive to a better bargaining atmosphere."

Apparently this feeling had not been well-founded, for on September 8, Sierra filed a charge (Case 31-CB-3058) on behalf of Garcia Roofing Company, alleging that Respondent had "restrained, coerced and intimidated the employees in violation of their rights under section 7 of the Act," thereby violating Section 8(b)(1)(A) of the Act. On September 13, Sierra, on behalf of Acme Roofing Company, filed the charge in Case 31-CC-1074, alleging that Respondent had violated Section 8(b)(4)(i) and (ii)(A) of the Act in the same manner as alleged in the similar charges filed on August 31. On September 19, the Regional Director approved a request to withdraw the charge in Case 31-CB-3058, submitted, according to Stephen Martin, because "the client wanted it withdrawn." On the following day, the Acting Regional Director approved a withdrawal of the charge in Case 31-CC-1074. Stephen Martin testified that the request to withdraw this charge had been based on the Regional Office's advice that the *Connell* doctrine,[4] which had been the theory on which the charges had been filed, was being reevaluated, with the result, testified Martin, that "[w]e really weren't getting any mileage out of this; it was just as convenient for us and more convenient for the Region, for us to withdraw pending the decision, and then if we found we still had a basis for it, we would proceed at that point."[5]

Finally, on October 2, Sierra, this time on behalf of Cagle Roofing, filed four unfair labor practice charges (Cases 31-CB-3076, 31-CB-3078, 31-CB-3079, and 31-CC-1077) against Respondent. Briefly, these charges alleged, collectively, that Respondent had "restrained and coerced Cagle . . . in the selection of its representatives"; had restrained and coerced employees in the exercise of their rights under Section 7 of the Act; had refused to meet to negotiate a collective-bargaining agreement; had engaged in concerted activity to force Cagle Roofing to sign an agreement which it had not seen; and had violated Section 8(b)(4)(i) and (ii)(A) in the same manner as alleged in the previous charges regarding that section of the Act. On November 20 and 29, the Regional Director approved requests to withdraw all of these charges. Douglas Martin, the Sierra official who had filed these four charges, testified that, although Regional Office personnel had told him that, at least some of them appeared meritorious, he had requested their withdrawal because he had not "want[ed] to drag the thing out any further, and I was so instructed by my employer."

So far as the record discloses, by November 2, all of the above-named employers had reached agreement with Respondent. On that date, Respondent filed a "Complaint for Damages; Abuse of Process and Alter Ego," in the Superior Court of the State of California in and for the county of Kern, against Sierra, Stephen and Douglas Martin, and Does One through Ten. That complaint alleges that the defendants had,

[2] Unless otherwise stated, all dates occurred in 1978.

[3] By mutual agreement, Sierra's representation of the Association terminated in mid-September, but apparently Sierra continued to represent Cagle thereafter.

[4] *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616 (1975).

[5] On November 13, the Board issued four decisions rejecting the interpretation of *Connell* which the General Counsel had been advancing. See, e.g., *Carpenters Local 944 (Woelke & Romero Framing)*, 239 NLRB 241 (1978).

> misused the process of the Federal National Labor Relations Board by filing numerous written charges against [Respondent] which [Respondent] is informed and believes . . . were false and known to be false at the time made, or, which said charges were not known by Defendants, and each of them, to be false or true. This use of the process was not authorized in the regular course of the proceeding.

The complaint continues on to recite that the defendants had engaged in this conduct with the ultimate purposes of gaining "an unfair advantage in collective bargaining in negotiations which were then in progress," of forcing Respondent "into entering a collective bargaining agreement which would have little or no legal effect," and of "destroy[ing] the very union itself." Based on these allegations, Respondent seeks $100,000 general damages, actual damages according to proof, $200,000 punitive damages, litigation costs, and "such other and further relief as the Court may deem just and proper."

Analysis

The threshhold issue presented here is whether Respondent filed its civil suit because of a reasonably based belief that Sierra had misused the Board's processes by filing charges or, conversely, whether the civil suit had been intended to retaliate against Sierra and the other defendents for having invoked the Board's processes. In resolving the matter, certain policy considerations should be kept in focus. First, inasmuch as the Board cannot initiate its own proceedings, it is dependent on private parties to bring violations of the Act to its attention by filing charges. This being the fact, there is a general policy favoring the fullest possible freedom for persons to file charges. See discussion in *NLRB v. Scrivener*, 405 U.S. 117, 121-122 (1972). Second, in order to implement that policy, the Supreme Court has held that such access may not be interfered with by employers, *Id.*, by labor organizations, *NLRB v. Shipbuilders*, 391 U.S. 418 (1968), or even by States. *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967). Third, while it is a well-settled principle that the filing of a civil lawsuit is not a violation of the Act, there is an exception to that principle "where the civil lawsuit was brought in order to pursue an unlawful objective." *Power Systems*, 239 NLRB 445 (1978), enforcement denied on factual rather than legal grounds, 601 F.2d 936 (7th Cir. 1979). The filing of a civil lawsuit to retaliate for having filed unfair labor practice charges is an unlawful object, for "civil actions for malicious prosecution carry with them a potential for chilling employee complaints to the Board . . . ." *Power Systems v. NLRB*, 601 F.2d at 940. It is with these policy considerations in mind that Respondent's motivation must be examined.

In the final analysis, Respondent has produced no evidence that, as alleged in the civil complaint, Sierra's charges had been false and had been intended as a vehicle for gaining an unfair advantage in negotiations, for forcing Respondent into a minimally effective collective-bargaining agreement, or for destroying Respondent.[6] Basically, Respondent's evidence consisted of no more than testimony and an affidavit of contractors to the effect that they had not specifically authorized Sierra to file these charges and, further, that Sierra had not explained completely to them why charges were to be filed. Yet, admittedly these contractors were not proficient in labor relations matters. That had been their purpose in retaining Sierra as their bargaining representative. As set forth above, the agreements signed by contractors retaining Sierra as their representative specifically authorize Sierra to act as their representative in dealings with Federal agencies and departments. In contrast to the restriction upon Sierra's authority to enter into binding contracts, those agreements impose no restriction on Sierra's ability to file charges with agencies, such as the Board. Most of the charges filed between August 31 and October 2 pertained to matters arising during the negotiations which Sierra had been conducting as the representative of the contractors. In these circumstances, it hardly shows a malicious intent for Sierra to have filed those charges without seeking specific permission of the contractors and after only minimal discussion with them. Indeed, at no point did any of the contractors testify or state that they had expressly prohibited Sierra from filing any of the charges against Respondent.[7] To the contrary,

[6] I precluded the General Counsel from showing the reasonableness of Sierra's reasons for having filed these charges before Respondent presented evidence to support the allegations in its civil complaint. Presumably, a respondent filing such a complaint, if acting in good faith, possesses evidence to support its allegations. That being the case, it is logical to require the production of such evidence before imposing the burden upon charging parties of undergoing examination of their motives for having filed charges. This is no more than an application of the basic principle requiring "that where the facts with regard to an issue lie peculiarly in the knowledge of a party [here, the evidence supporting the allegations in the civil complaint], that party has the burden of proving the issue," and of the equally fundamental policy of placing the risk of failure "upon the party who contends that the more unusual event [here, the filing of maliciously motivated charges] has occurred." McCormick, on Evid., 2d ed. (1972). For, were the General Counsel obliged to initially produce evidence regarding the basis for charges previously filed, then those same witnesses would have to be recalled and that same subject matter again covered in light of the respondent's evidence. Should, as is the case here, a respondent fail to produce evidence sufficient to show that prior charges had been filed maliciously and without probable cause, then the entire litigation of the collateral issue of the substance of those previous charges proves to have been needless. Further the charging party has been subjected to a wholly needless examination of his or her motive for having filed those charges—a process which, in itself, tends to act as an inherent deterrent to the filing of charges and, thus, is contrary to the general policy favoring the fullest possible freedom to file charges. Indeed, where, as here, charges have been filed and withdrawn after consultation with Regional Office personnel, placing an initial burden on the General Counsel to show the probable merit of those charges leaves that personnel vulnerable to being called as witnesses to corroborate charging parties or to explain their motives for what they said to charging parties—a process that ultimately proves needless should the respondent fail to show any basis for its civil lawsuit. Thus, the better procedure to follow is one which—like the procedure followed in cases involving alleged misconduct while engaging in protected activity, see *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964)—obliges the General Counsel to show only that charges had been filed, requires the respondent to produce its evidence of malevolent motivation for doing so, and only then places the burden upon the General Counsel to show, if possible, the probable cause for the allegations of those charges.

[7] There was testimony regarding contractor objections to the filing of two other charges by Sierra, Cases 31-CA-8357 and 31-CA-8358, alleg-

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they testified and stated that the Martins had told them of the possibility of filing charges against Respondent during their discussions regarding the progress of negotiations, and Reford Clagg of Acme Roofing Company testified that the Martins had expressed the opinion that Respondent had been "violating some of our rights." Both Clagg and Ray McWatters of Howard & Verrell Roofing Company denied expressly that the Martins had ever said that they intended to file untrue, false, or invalid charges against Respondent.[8]

The fact that Sierra had filed a total of 14 charges against Respondent during a 33-day period does not, of itself, establish that those charges had been filed with a malicious motive in the circumstances of this case. These charges arose from conduct occurring during the bargaining process. Bargaining is an ongoing process and if, in fact, Respondent had committed successive violations of the Act during that process, it can hardly complain about the number of charges filed against it. Moreover, to simply view the total number of charges, without closer scrutiny, is deceiving. Over half of those charges, eight, had been filed on August 31. In reality, those eight charges alleged but two violations of the Act: of Section 8(b)(3) and of Section 8(b)(4)(i) and (ii)(A). Because of the methodology used in assigning case numbers to charges, it is not possible to combine allegations of violations of those subdivisions of Section 8(b) of the Act into a single charge. (See National Labor Relations Board, Casehandling Manual [Part One] Unfair Labor Practice Proceedings, Sec. 10014.) Consequently, Sierra had been obliged to file separate charges involving these two subdivisions of Section 8(b) of the Act. Moreover, Stephen Martin's explanation as to why he had chosen to file separate charges on behalf of each contractor was not illogical and Respondent did not dispute his testimony that at that time it had raised an issue as to whether there were truly multiemployer negotiations in progess. Indeed, at no point did Respondent produce any evidence that the substance of any of the charges filed by Sierra had been specious and without any basis. To the contrary, as stated above, the *Connell* theory had been fully viable at the time that the 8(b)(4)(i) and (ii)(A) charges had been filed.

Similarly, Douglas Martin's explanation that he had filed four separate charges on October 2 because he had believed that there had been "four separate violations of the Act" is not illogical. In this regard, examination of former Cagle Roofing Foreman Jim Huff's testimony tends to show that there had been a walkout of Cagle's personnel at some point during the negotiations. That event could provide at least a not unreasonable basis for allegations that Section 8(b)(1)(A) and (B) and Section 8(b)(3) of the Act had been violated, depending on the circumstances. In sum, simply because 14 charges had been filed against Respondent in a 33-day period does not suffice, in the circumstances of this case, to give rise to the inference that Sierra had done so without probable cause.

Nor does the fact that Sierra chose to withdraw all of these charges. The Martins' explanations, described above, for submitting withdrawal requests were not illogical and did not evidence a malevolent motivation for having filed them initially. At no point did Respondent produce evidence that Sierra's purpose for withdrawing any of these charges had been based on a determination by the Regional Office that they had been baseless, nor as the *quid pro quo* for concessions by Respondent. Accordingly, the fact that each of these charges, filed between August 31 and October 3, had ultimately been withdrawn does not serve as a basis for inferring that they had been filed without probable cause for believing that the Act had been violated by Respondent.

Two added factors should be noted in appraising the lack of evidence to confirm Respondent's assertion that Sierra had been motivated by ulterior objectives in filing these charges. First, at no point did Respondent produce any evidence regarding either the factors that had led to the decision to institute civil proceedings or the deliberations that had led to that decision. In short, even though Huff alluded to a meeting of Respondent's members at which the decision had been made to file the suit, there is no evidence showing that Respondent's purpose had been based on the sincere conviction that Sierra had been acting malevolently in filing charges, as opposed to being based upon a desire to punish Sierra for having invoked the Board's processes and to teach Sierra what would happen if it did so in the future.

Second, there is no evidence that would tend to support Respondent's claim, made in its civil complaint, that it had been damaged in the amount claimed by Sierra's charges. This is not an insignificant factor for, seemingly, the only general and actual expenses that Respondent could have incurred as a result of Sierra's charges would have been its costs in participating in the investigation of them. Yet, section 10056.4 of the Casehandling Manual, *supra*, provides expressly that "[o]nly when the investigation of the charging parties' evidence and pertinent leads *point to a prima facie case* should the charged party be contacted to provide evidence." If, therefore, Sierra's charges had lacked merit, then Respondent would never have been contacted during the investigation and, so far

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ing violations of Sec. 8(a)(1) and (2) of the Act by Acme Roofing Company and by Howard & Verrell Roofing Company. These charges apparently were predicated upon Sierra's view of the best procedure to follow when confronted with the possibility that supervisory personnel were participating in union activities. See, e.g., *Masonry Contractors Association of Houston, Texas*, 245 NLRB 893 (1979). While there might be better methods for proceeding with this type of problem, Sierra's decision to file charges hardly can be deemed malicious. Moreover, at no point has Respondent shown that these charges played any role in its civil lawsuit or in its decision to file that lawsuit.

[8] Clagg testified that Stephen Martin had linked the filing of charges against Respondent with gaining "leverage" or an "advantage" over Respondent. However, he conceded that he did not recall the substance of his conversations with the Martins before and during negotiations. Further, Clagg testified that he possessed "[v]ery little" understanding of unfair labor practices. Thus, while a malevolent connotation could be inferred from that remark, it is equally inferrable that Martin had been referring to the "leverage" or "advantage" that would naturally result if the effect of the charge was to compel Respondent to cease making unlawful demands and negotiating in an unlawful manner. That, of course, would be perfectly proper "leverage" or "advantage" for Sierra to derive from the filing of charges. In light of the ambiguity of the remarks and of Clagg's imperfect recollection of what Stephen Martin had actually said, coupled with Clagg's lack of understanding of unfair labor practices, I find that no inference adverse to Sierra can be drawn from Stephen Martin's use of the term "leverage" or "advantage" in connection with the filing of charges against Respondent.

as the record discloses, it would have incurred no expenses as a result of the investigations of those charges. But, if Respondent did incur expenses by virtue of having to participate in the Regional Office's investigation, then the Regional Office must have felt that the evidence established a *prima facie* case that Respondent had violated the Act. In that event, it can hardly be maintained with any degree of persuasion that Sierra had filed the charges without probable cause.

That a person can be presumed to intend the natural and forseeable consequences of his or her acts is hardly a novel principle. See, e.g., *Radio Officers' Union v. NLRB*, 347 U.S. 17, 45 (1954), and cases cited therein. As stated above, the potential of a civil suit for chilling complaints to the Board has been recognized. *Power Systems v. NLRB, supra*. Here, Respondent has failed to show any basis for the allegations made in the civil lawsuit which it filed against Sierra on November 2. There is nothing in the record that would provide a basis for inferring that Sierra had a practice of filing baseless charges. Cf. *Power Systems v. NLRB, supra*. Therefore, in these circumstances, it can only be inferred that there was no basis for Respondent's lawsuit against Sierra and that Respondent commenced that civil action for the natural and foreseeable purposes of retaliating against Sierra for having filed charges and, further, of forestalling future charges filed against it by Sierra.

Having reached that conclusion, the first subsidiary question emerges: Does a violation of the Act occur where a civil lawsuit is directed against an employer's representative, in contrast to being filed against employees or their representative. It is plain that the protection accorded under the Act to those who file charges is not confined only to employees within the meaning of Section 2(3) of the Act. "Congress has made it clear that it wishes all *persons* with information about such practices to be completely free from coercion against reporting them to the Board." (Emphasis supplied.) *Nash v. Florida Industrial Commission, supra*, 389 U.S. at 238.[9] Thus, the protection of the Act has been accorded, for example, to supervisors who have filed unfair labor practice charges, *General Nutrition Center*, 221 NLRB 850, 858–859 (1975), and to labor organizations who have done so. *West Point Pepperell*, 200 NLRB 1031, 1039–40 (1972). Of course, it might well be argued that the results in these situations had a nexus with employees, who are specifically protected by Section 8(a)(4) of the Act, in that the conduct by nonemployees operated to benefit employees within the meaning of Section 2(3) of the Act. Here, of course, Sierra had been representing employers, not employees, when it had filed charges against Respondent. However, this argument loses its force when considered in light of certain other considerations.

Section 1(b) of the Act sets forth as being among

> the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

The equations drawn in the foregoing quotation—"employees and employers" and "labor and management"—make plain that the Act, as amended, is designed to accord equal treatment to employees and employers in parallel situations. Thus, to protect the representatives of one against civil lawsuits in certain situations, but not to protect representatives of the other from that same conduct would give rise to an inherent and needless imbalance. More important, to permit lawsuits intended to deter the filing of unfair labor practice charges when filed by employers and their representatives would expressly contravene the policy of providing "orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other . . . ." In this regard, it must be noted that many of the unfair labor practices proscribed by Section 8(b) of the Act are ones which naturally tend to be the subject of complaints by employers, rather than employees. Yet, employers are no less susceptible to the "potential for chilling . . . complaints to the Board," *Power Systems v. NLRB*, of lawsuits for filing charges than are employees. Consequently, to hold that the Act does not protect employers and their representatives from lawsuits for filing charges, when similar suits would violate the Act if directed against employees and their representatives, would be to create a void where both the policy of the Act and efforts to enforce its specific provisions could be frustrated. Such a state of affairs could hardly be conducive to the prevention of practices "inimical to the general welfare" and to the protection of "the rights of the public in connection with labor disputes affecting commerce."

Before departing from the first subsidiary question, one final point is worth consideration: If the state court action is permitted to proceed, there is a very real possibility that the substance of Sierra's charges will end up being litigated in state court and, further, that the state court will be called upon to determine a standard of reasonableness for the filing of charges. Yet, both are areas in which the Board has been granted authority by Congress to make such determinations. Indeed, in light of the Board's inability to initiate its own proceedings, the scope of the right to file charges is central to implementation of the prohibitions embodied by Congress in the Act. Accordingly, when, as here, "the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 202 (1978).

Here, Respondent could have invoked the Board's processes to remedy purported conduct which it alleges, in its civil complaint, constituted an effort to gain an unfair advantage in negotiations, force it into a meaning-

[9] Sec. 2(1) of the Act defines "person" as including specifically "legal representatives." That the Court had been using the term in its technical and precise sense under the Act is shown by the sentences which follow those quoted above, in which the Court cited employee protection under Sec. 8(a)(4) of the Act to illustrate the principle which it had enunciated.

less agreement and to destroy Respondent. Respondent could have filed its own charge alleging that Sierra had been violating Section 8(a)(5) of the Act by using the technique of filing charges to impede bargaining. Instead, it chose to bypass the Board and to institute a proceeding in another forum, even though issues of substantive law and procedure under the Act were central to a determination of its lawsuit. This it may not do. *Id.*

Therefore, I find that employers and their representatives are entitled to the Act's protection where civil suits are filed against them in retaliation for their having filed unfair labor practice charges with the Board. However, this does not end the matter. In the instant case, the General Counsel has selected Section 8(b)(1)(A), which provides protection only to employees, as the subdivision of Section 8(b) of the Act that has assertedly been violated by Respondent's conduct. Since Section 8(b)(1)(A) specifically provides protection from restraint and coercion only to employees, Respondent argues, in essence, that it is inapplicable to situations, such as the instant case, where a labor organization filed a retaliatory and baseless abuse of process civil lawsuit against an employer's representative. That is, that in circumstances, such as those presented in the instant case, the appropriate subsection of the Act that is violated by Respondent's conduct should be Section 8(b)(1)(B), which prohibits interference with an employer's selection of its bargaining representative, or even Section 8(b)(3), which arguably would apply where a labor organization seeks to retaliate against an employer's representative who has sought the protection of the Act from unlawful bargaining proposals and conduct by a labor organization. While such an argument appears logical at first blush, its apparent logic loses force when the problem is examined in light of four other considerations essential to the overall policy of maximizing the right of employers and their representatives to file charges.

First, as set forth *infra*, it is general policy to favor the fullest possible freedom for persons to file charges with the Board. *NLRB v. Scrivener, supra*. Accordingly, any employer or its representative who files a charge should receive the protection necessary to exercise the fullest possible freedom to file charges. Yet, to rely on Section 8(b)(3) of the Act to protect that freedom would be to limit the protection of employers and their representatives to charges arising from bargaining situations. For example, relying on Section 8(b)(3) of the Act would not suffice to provide protection to the representative of an employer which has no bargaining relationship with a labor organization that has made that employer the target of unlawful secondary activity in violation of Section 8(b)(4)(B) of the Act, consequently, to rely on Section 8(b)(3) of the Act as the basis for providing production to employers and their representatives would result in somewhat less than full protection for their freedom to file charges, contrary to the Supreme Court's express mandate.

Nor would reliance on Section 8(b)(1)(B) of the Act provide that protection. For, while that subsection of Section 8(b) of the Act might well be interpreted to extend protection to employers' representatives, it would not extend similar protection to employers who choose not to be represented and who choose to file their own charges. Consequently, to provide protection only under Section 8(b)(1)(B) of the Act would result in a situation where only representatives of employers, but not employers themselves, would enjoy the fullest freedom to file charges with the Board. Thus, while other subdivisions of Section 8(b) of the Act might apply to certain persons filing certain types of charges, Section 8(b)(1)(A) of the Act is the only subsection of Section 8(b) of the Act that is susceptible to providing the most complete protection for all persons who file charges—that is, for protecting "all persons with information about such practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission, supra*, 389 U.S. at 238.

The second consideration is that the employees of the employers represented by Sierra are members of the general public whose welfare, as set forth in Section 1(b) of the Act, is promoted by the effective implementation of the provisions of the Act. Indeed, as set forth above, they are one of the two groups which are singled out by Section 1(b) of the Act as the specific beneficiaries of the Act's various provisions. Consequently, to the extent that a labor organization is able to restrain or coerce persons from exercising the fullest freedom to file charges, it is able to frustrate implementation of the Act, thereby impairing the operation of the Act, as set forth by Congress, to the detriment of employees—both *qua* employee as defined by Section 2(3) of the Act and *qua* members of the general public.

Third, the proscriptions of the Act are part of national labor policy. As such, they are matters of concern to employees in the same fashion as unemployment compensation claims, see *Self Cycle & Marine Distributor Co.*, 237 NLRB 75 (1978), as workmen's compensation benefits, *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979), and, indeed, as enforcement of state safety regulations. *Alleluia Cushion Co.*, 221 NLRB 999 (1975). In fact, even beyond their general interest in effective implementation of the provisions of the Act, employees would have an even greater interest in Respondent's lawsuit against Sierra. For, like Sierra, employees might entertain thoughts of filing charges against Respondent. However, further prosecution of Respondent's lawsuit for abuse of process, even if unsuccessful in the end, would tend to deter employees from filing charges inasmuch as it would tend to cause them to fear that they, also, might become the target of such a suit which, even if unsuccessful, would cause them to incur "immediate expense by having to retain private legal counsel to defend . . . against the Respondent's lawsuit." *Power Systems, supra*. Consequently, the direct effect of Respondent's lawsuit for abuse of process would be to deter employees from exercising the fullest possible freedom to file charges with the Board.

Finally, the subject matter of Sierra's charges against Respondent did involve matters having a direct bearing on employees of the contractors whom Sierra had represented. For, the charges arose as a result of negotiations for a collective-bargaining agreement. That agreement, once negotiated, would establish the terms and condi-

tions of employment under which those employees would be working. To the extent that Respondent's conduct occasioned delay in reaching agreement, those employees would suffer a concomitant delay in deriving the benefits of newly negotiated terms and conditions of employment. To the extent that Respondent was able to obtain agreement to provisions proscribed by the Act, those employees would be compelled to work under unlawful terms of employment. To the extent that Respondent led the employees into activity which was prohibited by the Act, those employees ran the risk of being terminated due to participation in activity not protected by the Act. In sum, the subject matter of the charges filed by Sierra had a direct relationship to the terms and conditions of employment of employees employed by the contractors and, accordingly, correction of Respondent's conduct would have operated to the benefit of those employees. There was, consequently, a direct relationship between Sierra's charges and the employees of the contractors represented by Sierra.

In sum, a civil lawsuit for abuse of process has a potential for chilling complaints to the Board where, as here, it is filed to retaliate against charging parties for having filed unfair labor practice charges and to deter them from filing such charges in the future. Legal representatives are "persons," under Section 2(1) of the Act, entitled to file charges. *National Maritime Union of America*, 245 NLRB 149 (1979). Accordingly, they are among those whose right to file charges, "the Board is charged with protecting." *NLRB v. Horn & Hardart Co.*, 439 F.2d 674, 678 (2d Cir. 1971). Therefore, where an employer's legal representative has become the target of a retaliatory lawsuit for having filed charges with the Board against a labor organization, the public interest in having the fullest possible freedom to file charges and the employees' interests in effective enforcement of the Act and in being free from the effects, direct and indirect, of unlawful conduct by labor organizations warrant the conclusion that the labor organization filing that suit violates Section 8(b)(1)(A) of the Act. I find that this subsection of the Act was violated by Respondent's civil lawsuit in the instant case.

This, then, leaves the question of whether Respondent's unlawful conduct affects commerce within the meaning of Section 2(6) and (7) of the Act. During 1978, Sierra represented at least one employer which conducted operations in another State. In the course of the representation, Sierra's representatives journeyed from California to the State of Kansas. In fact, once there, Sierra had occasion to file unfair labor practice charges with Region 17 of the Board in Kansas City, Kansas, due to conduct arising during the course of the underlying dispute between that employer and its employees' representative. Moreover, though less than artfully proved, Stokes Roofing—one of the employers represented by Sierra during the August to October negotiations with Respondent and one of the employers on whose behalf Sierra filed charges that have become the subject of Respondent's civil lawsuit—is a sole proprietorship, engages in nonretail operations, and during 1978 received in excess of $50,000 of red cedar shakes which originated in Canada and in the States of Washington and Oregon. Indeed, a single truckload of those shakes is worth almost $10,000 and during December, alone, Stokes Roofing purchased at least $40,000 of shakes which originated in the States of Washington and Oregon. Consequently, the operations of Stokes Roofing, alone, suffice to satisfy the Board's discretionary inflow standard for asserting jurisdiction. *Siemons Mailing Service*, 122 NLRB 81, 85 (1958); *Iron Workers Local 1 (Duane Majeske d/b/a Colt Construction Co.)*, 245 NLRB 132 (1979).

The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent, set forth above, occurring in connection with the operations of Sierra and employers represented by Sierra, described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead and have led to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

1. Sierra Employers Association, Inc., is the agent of employers engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. United Slate, tile and Composition Roofers, Damp and Waterproof Workers' Association Local Union No. 66 is a labor organization within the meaning of Section 2(5) of the Act.
3. By filing a "Complaint for Damages; Abuse of Process and Alter Ego" in the Superior Court of the State of California in and for the county of Kern as a means of retaliating against and deterring Sierra Employer Association, Inc., from filing unfair labor practice charges with the Board, maliciously and without probable cause for alleging that Sierra Employers Association, Inc., had intended to deliberately cause injury by filing those charges, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association Local Union No. 66 has violated Section 8(b)(1)(A) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association Local Union No. 66 has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

With respect to the latter, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association Local Union No. 66 shall be ordered to cease and desist from prosecuting its complaint against Sierra Employers Association, Inc., and the other named defendants in that complaint and shall be ordered to withdraw the complaint which it filed. In addition, in order to place Sierra Employers Association, Inc., in the position it would have been absent these unfair labor practices,

United Slate, Tile and Composition Roofers, Damp and Waterproof Workers' Association Local Union No. 66 shall be ordered to make Sierra Employers Association, Inc. and the other defendants in that action whole for all legal expenses incurred in the defense of that lawsuit.[10]

[Recommended Order omitted from publication.]

[10] *Power Systems, supra.*